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NG CHOOI FOONG

v.

DYNAURA MUTIARA SDN BHD & ANOR

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HIGH COURT MALAYA, SHAH ALAM
NIK HASMAT MOHAMAD JC
[CIVIL SUIT NO: MT5 (MT1)-22-997-2007]
3 NOVEMBER 2010

C **CONTRACT:** *Misrepresentation - Oral representation - First defendant represented to provide special security measures in housing project - Robbery committed at plaintiff resident's house - Whether 1st defendant failed to provide reasonable and sufficient security measures - Whether 1st defendant bound by representation made - Whether 1st defendant committed breach, neglect and carelessness in maintaining security of residences in housing project*

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E **CONTRACT:** *Breach - Action for damages - Term of Deed of Mutual Covenant - To provide security services in return for maintenance fee - Whether defendants committed neglect and carelessness in maintaining security of residence in housing estate - Whether breach proved*

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F **TORT:** *Negligence - Duty of care - Breach of duty - Robbery committed at plaintiff's house - Second defendant owner of property adjoined with plaintiff's neighbourhood - Whether 2nd defendant liable in failing to prevent wrongful and unauthorised entry into its land that led to robbery in plaintiff's house - Whether 2nd defendant legally obligated to plaintiff*

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G This was the plaintiff's claim against defendants for damages arising from the defendants' breach of contractual duty of care and neglect which resulted in an armed robbery being committed at the plaintiff's residence. The plaintiff had purchased a housing lot in the 1st defendant's housing project ('Pinggiran Golf') in the belief of the oral representations made by the 1st defendant's representatives regarding special security measures, *ie*, 'enhanced security surveillance' to safeguard and ensure the security of the residents at all times. The 2nd defendant at the material time owned an adjacent property sharing a common boundary and within the vicinity of Pinggiran Golf. The plaintiff in her claims, relied upon the Deed of Mutual Covenant ('DMC') which was executed with the 1st defendant and contended that: (i) the 1st defendant failed in their duty of care and negligently allowed

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unauthorised persons to enter the adjacent property to the plaintiff's residence; and (ii) the 2nd defendant failed to safeguard the security of its own property with adequate security measures to ensure the safety and security of its adjacent neighbourhood, *ie*, Pinggiran Golf.

Held (allowing plaintiff's claim against 1st defendant with costs):

- [1] Although the definition of security service was absent in the DMC, it was reasonably expected of the 1st defendant to provide the plaintiff with adequate security measures consistent with the security expected of a posh and classy neighbourhood. The occurrence of an armed robbery at the plaintiff's residence was equivalent to a fundamental breach of duty of care imposed on the 1st defendant. The 1st defendant had negligently contributed to the occurrence of the robbery at the plaintiff's house due to its failure to provide necessary security service to the plaintiff. (para 9)
- [2] The 1st defendant owed the plaintiff a duty of care based on the clear undertaking by both parties pursuant to the duly executed DMC. Based on the provision stipulated in the DMC, pending the handover of the 1st defendant's function to the appropriate authority and in consideration of the maintenance fee by the plaintiff proprietor, the 1st defendant was legally obligated to provide maintenance and security services to the proprietors of Pinggiran Golf. (para 9.1)
- [3] The 1st defendant owed the plaintiff a duty to provide security service as how it was represented to her due to the fact that she had dutifully paid the maintenance in exchange for its reciprocal provision of security service. Furthermore, the 1st defendant had the discretion to impose any improvement or enhancement required for the security of the Pinggiran Golf proprietors. The plaintiff's witnesses had also testified that prior to the purchase of the plaintiff's property, the representatives of the defendant through an oral representation, gave assurance of the special measures, *ie*, 'enhanced security surveillance' to safeguard and ensure the security of the residents at all times. It followed that the plaintiff succeeded to prove that the 1st defendant owed the

- A plaintiff a duty of care to provide reasonable security which commensurate the security expected of a posh and classy community of Pinggiran Golf. (paras 9.2 & 9.3)
- B [4] The 1st defendant's failure to detect the occurrence of the robbery until it was informed by the plaintiff proved the wanting and poor security service in that neighbourhood. Furthermore, although it was not expressed in the DMC, the defendant owed a duty to alert and keep the residents of Pinggiran Golf informed of any incident affecting their security and properties particularly on attempted break-ins or burglaries within their neighbourhood which the 1st defendant failed to do. (para 9.4)
- C [5] The nightly mobile patrolling of two security guards on motorcycles provided by the 1st defendant was inadequate and ineffective due to the wide coverage of the resort comprising of three developments including Pinggiran Golf which was too expensive for effective patrolling. (para 9.6)
- D [6] There was no evidence that indicated the plaintiff had negligently caused or contributed to the occurrence of the robbery. The plaintiff claimed that the alarm system was not switched on due to the fact that her husband was still awake and normally would only be switched on when the occupants were asleep or not in the house. Failure on the part of the plaintiff to activate the alarm did not render the plaintiff liable for negligence. (para 9.7)
- E [7] Despite the occurrences of attempted break-ins and burglary within the Pinggiran Golf neighbourhood, the 1st defendant clearly failed to take remedial measures to improve and enhance the security service at the said neighbourhood. It was due to the fact that the numbers of security guards engaged by the first defendant remained at two and were not given adequate or suitable job training on security. (para 9.8)
- F [8] The damages and monetary losses suffered by the plaintiff due to the robbery at her residence were directly attributed to the negligence, failure and fundamental breach by the 1st defendant to provide reasonable and sufficient security in that residential neighbourhood. (para 9.9)
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[9] There was no duty of care owed to the plaintiff by the 2nd defendant due to the fact that the contractual relationship between both defendants could not be proven, and, thus, the 2nd defendant was not legally obligated to the plaintiff. The 2nd defendant as the owner of an adjoining property could not be held liable for failing to prevent wrongful and unauthorised entry into Pinggiran Golf resulting in the plaintiff's loss and damage. (para 9.10)

For the plaintiff - Gideon Tan; M/s Gideon Tan Razali Zaini

For the defendant - Dato' Cecil Abraham; M/s Zul Rafique & Partners

Reported by Melanie Murthy

JUDGMENT

Nik Hasmat Mohamad JC:

Background Facts

[1] Plaintiff's claim against the first defendant premised on a breach of contractual duty of care and negligence on the part of both defendants which had caused a robbery to occur at the plaintiff's premise. On 3 April 2007, plaintiff's bungalow was broken into by armed robbers which resulted in loss and damage to the plaintiff. The first defendant was at all material times, the developer of a housing development known as the Pinggiran Golf and was responsible for the management and administration of Pinggiran Golf at Saujana Resort, Section U2, 40150 Shah Alam, Selangor Darul Ehsan. The second defendant was at all material times the owner, operator and manager of an adjoining golf course, Saujana Golf and Country Club, which shared a common boundary and within the vicinity of Pinggiran Golf. Pursuant to a Deed of Mutual Covenant dated 5 March 2003 which the plaintiff had executed with the first defendant, the first defendant covenanted that pending the handing over to an authority or the house owner's association and upon payment of a contribution by the proprietor, the first defendant shall provide the services relating to the management, maintenance, control and security of the common property.

A Parties' Contention

[2] Plaintiff contended that pursuant to the deed, the defendant is legally obligated to adequately protect the plaintiff's residence by providing the plaintiff with security services consistent with an affluent and exclusive gated community. The plaintiff further contended that the first defendant had breached the terms of the deed where the first defendant's failure to provide adequate security measures to safeguard the security and safety of Pinggiran Golf had contributed to the occurrence of the robbery at plaintiff's residence and render the first defendant liable for plaintiff's losses and damages.

[3] With respect to the second defendant, plaintiff contended that the second defendant had breached its duty of care towards the plaintiff where having control and management over their golf course, the Saujana Golf and Country Club, the first defendant had failed in their duty of care and negligently allowed unauthorized persons to enter into the adjacent gated golf course community of Pinggiran Golf and the consequent robbery to the plaintiff's residence. The second defendant had failed to safeguard the security of the golf course with adequate security measures to ensure the safety and security of the adjacent neighbouring gated community of Pinggiran Golf.

Plaintiff's Claim

[4] In accordance with para. 17(a), (b), (c), (d), (e) and (f) of the plaintiff's amended statement of claim, the plaintiff is claiming from the first defendant and second defendant for a declaration that both defendants are liable for all loss and damages arising from plaintiff's claim and shall not be assigned to the Pinggiran Golf Home Owner's Association or any other party, general damages, interest at the rate of 8% per annum on general and special damage from date of the writ until full settlement, costs and other relief deem fit by the court. The plaintiff further claimed from the first defendant special damages in the sum of RM335,994 for losses and damages during the robbery to the plaintiff's premise.

Issues

[5] Whether both the defendants owe a duty of care and had breached their duty of care owed to the plaintiff in negligently allowing the robbery to occur at plaintiff's premise;

[6] Whether the damages and losses suffered by the plaintiff is too remote and whether the defendants were liable for the plaintiff's losses; and A

[7] Whether the plaintiff has duly proved the loss and damage suffered by the plaintiff. B

Judgment

[8] Having considered the oral testimony from plaintiff's witnesses, defendant's witnesses, documentary evidence and submission by learned counsels for both parties, the court decides that on a balance of probability, the plaintiff have succeeded to prove their case against the first defendant and thus, plaintiff's claim is hereby with costs. With regard to the second defendant, plaintiff had failed to prove their case against the second defendant and accordingly, plaintiff's claim against the second defendant is dismissed with costs. C D

Court Findings

[9] In ascertaining the scope of security service and whether or not it was incumbent of the first defendant to provide the plaintiff with unique and special features of security. Although, there is an absence of the definition of security service in the deed, and whether or not it included the special security measures as was asserted by the plaintiff, the court is of the view that the first defendant is reasonably expected to provide the plaintiff with adequate security measures consistent with the security expected of an affluent and exclusive gated neighbourhood. The occurrence of an armed robbery at the plaintiff's premises tantamount to a fundamental breach of duty of care imposed on the defendant where the defendant had failed to provide plaintiff with the necessary security service and had negligently contributed to the occurrence of robbery at the plaintiff's residence. E F G

9.1 A duty of care is owed by the first defendant to the plaintiff based on the clear undertaking of both parties pursuant to the deed of mutual covenant executed by both parties pursuant to the deed of mutual covenant, dated 5 March 2003, which was entered by the plaintiff and the first defendant for the purchase of a bungalow lot located at 17, Pinggiran Golf Saujana Resort, Section U2, 40150 Shah Alam, Selangor. Further, Clause 23.1 of the sales and H I

- A** purchase agreement clearly provides that the agreement shall be binding on the successors in title and assigns of the vendor, the heirs, personal representatives or successors in title, as the case may be, and permitted assigns of the purchase.
- B** Clause 3.1 of the deed of mutual covenant provides:
- C** Until the following functions shall be handed over to the Appropriate Authority or the Homeowners' Association (as the case may be), the Company shall provide management, maintenance, repair, administration and control of the Common Property including the provisions of security services and refuse collection (hereinafter collectively referred to as "the maintenance services") and the Proprietor shall contribute to the Company to such management, maintenance, repair, administration and control.
- D** Based on the clear provision of the aforesaid section, pending the handing over of the function of the first defendant to the appropriate authority, or the homeowners' association, and in consideration of payment of maintenance fee by the plaintiff proprietor, the first defendant is legally obligated to provide maintenance service including the provision of security service to the proprietors of Pinggiran Golf.
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- F** 9.2 Further, based on the evidence of both PW1 and PW2, service charges in the amount of RM1,103.33 was paid at every quarterly interval by the plaintiff as maintenance fees in respect of the security service provided by the first defendant. As there were no other common facility available to the resident of Pinggiran Golf such as the clubhouse and swimming pool, payment of the maintenance fee by the plaintiff was mainly for the provision of security service by the first defendant. In this regard, it was clear that as the plaintiff had dutifully paid the maintenance fee in consideration of the reciprocal provision of security service by the first defendant, the first defendant fundamentally, owe the plaintiff a duty to provide the security service as was represented (by their representatives) to the plaintiff. Further, pursuant to cl. 3.5 and 3.6 of the deed, the first defendant have the right to impose and increase the maintenance contribution by a notice in writing to the proprietors in the event first defendant, in providing the
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service, had incurred an increased cost. Such increased amount of maintenance contribution is conclusive and binding on the proprietor. In increasing the maintenance contribution, the first defendant is not legally required to obtain the permission of the Pinggiran Golf proprietors. It is therefore the discretion of the first defendant to decide and impose any improvement or enhancement required for the security of the Pinggiran Golf proprietors. In the absence of such imposition, and notwithstanding that there is no consensus by the residents on the adequacy of the security measures in Pinggiran Golf, it is therefore incumbent on the first defendant to provide security service befitting the expected security of an exclusive and gated neighbourhood. The first defendant therefore owes a duty to the residents of Pinggiran Golf including the plaintiff to provide reasonable and adequate security which is reasonably consistent with a gated and privileged community.

- 9.3 Further, PW1 and PW2 gave evidence of oral representation and assurances made by representatives of the first defendant prior to the purchase of plaintiff's property in the third quarter of 2002. According to the plaintiff, the first defendant's sales representatives had promised her and her husband, PW1, of the special security measures to safeguard and ensure the security of the residents of Pinggiran Golf were maintained at all times as contained and manifested in the brochures of Fairway 18 and Palm View in exh. P1 which included 24 hour enhanced security. PW1 however admitted that the representation by the first defendant that were contained in brochures were in respect of other development, namely Fairway 18 and Palm View and that, in respect of Pinggiran Golf, only oral representation were made of the "enhanced security surveillance". In this regard, based on the evidence as a whole, the plaintiff succeeded to prove that oral representation were made by the first defendant of the enhanced security measures expected at Pinggiran Golf where both plaintiff and PW1 were shown brochures of such security features in the related adjoining development of Fairway 18 and Palmview. In the absence of rebuttal evidence from the defendant, the plaintiff succeeded to prove that the first defendant owe the plaintiff a duty of

- A care to provide reasonable security which commensurate the security expected of an exclusive gated community of Pinggiran Golf.
- B 9.4. The first defendant had clearly breached their contractual duty to provide the plaintiff with the security to their premise and property. The failure on the part of the first defendant to detect the occurrence of the robbery until informed by the plaintiff proved the wanting and poor security service provided by the first defendants. The first defendant failed to provide adequate and reasonable security service which commensurate the expected security of an exclusive and gated development of Pinggiran Golf. Further, although not expressly provided in the deed, the defendant owe a duty to alert and keep the residents of Pinggiran Golf informed of any incident affecting the security of the residents and their properties particularly of attempted break in or burglaries within their neighbourhood. In the light of other incidences of theft and attempted burglaries prior to the robbery at plaintiff's residence, the first defendant is obligated to provide an improved and enhanced security service to the residents. The first defendant however failed to alert, inform or keep the residents informed of other prior incidences of attempted burglaries affecting the neighbourhood of Pinggiran Golf and despite other prior incidences of attempted burglaries and the robbery on the plaintiff's residence, the first defendant did not make any improvement to the general security of Pinggiran Golf. The first defendant's dog patrol service was only briefly introduced after the robbery at plaintiff's residence but was subsequently terminated and no evidence was adduced on improved security to Pinggiran Golf.
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- H 9.5. PW2 gave evidence of instances where the entrance to Pinggiran Golf was left unattended by the first defendant's guards and plaintiff's complaints to DW1 remained unattended by the first defendant. Based on DW1 evidence, no patrolling was conducted at the golf course by the first defendant's guards during the day and that during the night, the first defendant provided security where two security guards were stationed at the front gate and at the back of Pondok Pengawal 2, whilst mobile patrolling were conducted by another two guards who conducted their patrol on motorcycles. The two guards were required to patrol the
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entire golf club including the Palmview, Lakeview and the Pinggiran Golf, a considerably extensive area and effectively, the guards merely conducted two to three minutes of patrolling for every three hours at the area of plaintiff's property. According to DW6, the two guards required approximately three hours to complete the patrolling for the entire Palm Course and Bunga Raya Course. It was further confirmed that the back of Pinggiran Golf is generally unlighted and that as there was no fencing along the Persiaran Golf, it was possible for anyone to gain entry to the golf course.

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- 9.6. It was therefore clear that the security service that was provided by the first defendant, particularly the nightly mobile patrolling by the two guards on motorcycles were inadequate and ineffective as the Saujana Resort development which included the three developments of Lakeview, Palmview and Pinggiran Golf was too expensive for effective patrolling. DW6 had also agreed in court that the patrolling by the guards were not conducted thoroughly and that the standing instruction was for the guards to be more concerned with the security of the golf course, rather than the resident's property. It was clear that as there were only two mobile guards on motorcycles to patrol an area exceeding 6 km, the level of security provided to the plaintiff were lax and wanting. The two guards, due to the size of their coverage, could not provide adequate and effective security service to the property of the residents as they effectively were merely riding from one checkpoint to another checkpoint.

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- 9.7. Despite the regular periodical payment for the maintenance service, and despite living in a secured gated community, the plaintiff had found it necessary to engage a guard and build a guardhouse at his residence at his own expense. Such act by the plaintiff was actuated by the plaintiff's concern at the apparent inadequate and substandard security service that was provided by the first defendant to the residents of Pinggiran Golf. There was no evidence that indicate plaintiff's negligence had caused or contributed to the occurrence of the robbery. According to the plaintiff, the house alarm to the plaintiff's residence was not switched on as her husband, PW2 was still awake and working in his study and that the alarm system is only activated when the occupants are asleep or not in the house. Failure on the part of the plaintiff to

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- A activate the alarm does not render the plaintiff liable for negligence. The plaintiff had taken reasonable steps to prevent the occurrence of a burglary at her property where despite the provision of “adequate” security by the first defendant, and apart from the installation of a sophisticated
- B alarm system to prevent any break in or robbery to her residence, the plaintiff had installed other added security measures to her property which was gated at the front and equipped with grille.
- C 9.8. Based on the evidence of the guards employed by the first defendant, it was clear that the guards were neither given adequate nor suitable on job training on security. DW4 gave evidence that he was not provided any training and that his supervisor had merely explained to him of the job
- D requirement whilst DW3’s gave evidence of courses that he attended was mainly relating to the handling of fire and bomb threats. Despite the occurrences of attempted break in and burglary on resident’s property within the Pinggiran Golf neighbourhood, the first defendant clearly failed to take
- E remedial measures to improve and enhance the security service of Pinggiran Golf where the number of the security guards that was engaged by the first defendant remained at two guards at the guard house and two mobile patrolling guards on motorcycle to patrol during the night the entire
- F Saujana Resort, Pinggiran Golf, Lakeview and Palmview. Training of the guards appear wanting where it was confirmed by DW3 in court that the courses he attended were that in relation to the handling of fire and bomb threat whilst DW4 admitted that training (as security guard) is by
- G way of explanation by his supervisor. The manner in which the security for the Pinggiran Golf residents were conducted by the guards and the limited number of guards that were employed by the first defendant to provide security for a prestigious and privileged community support a finding of a
- H fundamental breach of duty on the part of the first defendant.
- I 9.9. Therefore, it is the court’s view that the damage and monetary losses suffered by the plaintiff as a result of the robbery incident at her residence was directly attributed to the negligence, failure and fundamental breach by the first defendant to provide reasonable and sufficient security to the plaintiff’s residence consistent with the security expected of

a luxurious and prestigious gated development. The first defendant is clearly liable for the loss and damage suffered by the plaintiff as it was caused by the first defendant's breach of duty. It was reasonably expected and foreseeable that the inadequate and wanting security service of the first defendant had facilitated and enabled the occurrence of the robbery incident at the plaintiff's residence. In this regard, the plaintiff have succeeded to prove her claim for damages where based on the numerous invoices produced before the court, it was clear that the invoices were in respect of purchases made by PW2 for himself and for his wife.

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- 9.10. Further, the court is of the view that the second defendants owe no duty of care to the plaintiff to prevent unauthorized entry, encroachment and intrusion from a third party into the premise of a proprietor in a neighbouring development, Pinggiran Golf. In the absence of a special proven relationship between both defendants, the second defendant as the owner of an adjoining property could not be held liable for failing to prevent wrongful and unauthorized entry into Pinggiran Golf, which had caused consequent loss and damage to the plaintiff. As an occupier of an adjoining property, the second defendant have no contractual relationship with the adjacent developer first defendant, nor the plaintiff proprietor or homeowner, and therefore owe no duty of care to the plaintiff. The second defendant is under no legal obligation to prevent the occurrence of robbery to the plaintiff nor prevent a third party from wrongful access to a neighboring property, namely Pinggiran Golf through their land. Further, it was not reasonably foreseeable that the second defendant's failure to secure their property had resulted in the occurrence of robbery to the adjoining property owner, the plaintiff. The second defendant, is therefore not duty bound to inform and alert the residents of Pinggiran Golf of the incidences of attempted burglaries and break-ins at the second defendant's golf course and that the written notice at the second defendant's premise was merely intended to alert and warn their members of the incidences of burglary at their golf and did not render the second defendant liable for failing to alert others, namely the plaintiff.

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- A According to PW1, he had seen a written notice at the premise of the second defendant which had warned club members of the incidents of theft at the golf course. DW6 confirmed that the notice notifying members of the club of numerous theft incidences at the golf course had been posted at the second defendant's club prior to his joining the second defendant on 8 January 2004. In this regard, plaintiff's contention that the second defendant was negligent in failing to take steps to prevent unauthorized and unlawful access by third party and to enhance the security along the boundary between Pinggiran Golf and the second defendant's golf course was not successfully proved.
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- [10] Based on the company searches on both defendants, the first defendant and the second defendant are in essence from the same group of companies and shared the same registered address, company secretary, and a common director. The first defendant, the second defendant and Handal Dinamis are interlinked and form a part of the same group of companies, namely the Peremba Development. Based on the testimony of PW1, both the first defendant and the second defendant are related, closely linked and are from the same group responsible for the Peremba Development. However, despite the apparent proximity between both defendants, it is clear to the court that legally, both the first defendant and the second defendant are separate and distinct entity with separate shareholders and in the light of a clear breach of duty of care on the part of the first defendant, the second defendant's liability on a balance of probability, was not successfully proved.
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- [11] Therefore, based on the evidence in its entirety, and on a balance of probability, the plaintiff had proved their case and accordingly, plaintiff's claim against the first defendant for prayer (a), (b), (c) and (d) is allowed with costs. As regard to the amount of special damages and general damages awarded by the court against the first defendant in the amount of RM250,000 and RM50,000 respectively, the court considered such amount fair, reasonable and not manifestly excessive in the light of oral testimony and documentary evidence adduced before this court.
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